IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 1189 OF 2005

Gopinath Ganpat Pawar ..Appellant
(Org.Plff.)

Vs.

1. Shobhana Vasudeo Mane and anr. ..Respondents

Mr. Dnyaneshwar J. Deshmukh for appellant.
Mr. R.S. Datar for respondent no.1.
Mr. Pankaj Das for respondent no.2.

CORAM: B.H. MARLAPALLE, J.

Date : June 26, 2007.

P.C.:

1. Heard Mr. Deshmukh the learned counsel for the appellant-plaintiff and Mr. Datar the learned counsel for the original defendant no.1 and Mr. Das the learned counsel for the original defendant no.2.

2. Plaintiff’s suit i.e. RCS No. 63 of 1994 filed for declaration, injunction and in the alternate for possession of the immoveable property came to be dismissed by the learned Civil Judge, J.D. at Deorukh

vide his Judgment and Order dated 6/11/2000 and Civil Appeal No. 101 of 2000 filed by the plaintiff was also dismissed by the learned Joint District Judge at Ratnagiri on 29/4/2005 and hence this second appeal by the plaintiff.

3. It is also pertinent to note that in RCS No. 63 of 1994 the defendant no.1 had filed a counter claim and the same came to be allowed directing partition of 1/2 share in the suit property and consequently possession of the same through the Collector to be handed over to her. The trial court further held that the plaintiff was entitled for 1/2 share in the suit property and consequently he was entitled for partition and separate possession of his share on the payment of necessary court fee stamp to the extent of his share. The counter claim for injunction filed by the defendant no.1 came to be dismissed and this decree of the trial court has been accepted by the defendants.

4. Agricultural land admeasuring 4 H. 69 R. in Survey No. 18, Hissa No.6 was the ancestral property

inherited by the plaintiff through his father, who died on 18/11/1992. Half of the suit land was sold by the plaintiff's father to the late husband of defendant no.2 by a sale deed dated 20/10/1965 (Exh.79). On 9/5/1983 the late husband of defendant no.2 sold 1/2 share purchased by him on 20/10/1965 to the husband of defendant no.1 by a sale deed at Exh.81. The plaintiff claimed that for the first time on 10/8/1994 he learnt through the defendant no.1 that his father had sold on 20/10/1965 half share of the suit land to the late husband of defendant no.2 and in turn, the husband of defendant no.1 had purchased the same property on 9/5/1983. He further claimed that as on 20/10/1965 he was a minor and his father had not sold 1/2 share for the legal necessity of the family and, therefore, the same transaction was illegal. The defendant no.2 did not appear before the trial court and, therefore, the suit proceeded ex parte against her. The defendant no.1 filed her Written Statement at Exh.14 and contested the suit pointing out that on 20/10/1965 itself the possession of the 1/2 share sold by the plaintiff's father was put in possession of the late husband of defendant no.2 who again on signing of

the sale deed dated 9/5/1983 put in possession the very same 1/2 share of defendant no.1 and, therefore, the suit was not within limitations. It was further claimed that when the sale deed at Exh.79 was signed on 20/10/1965, the plaintiff was about 19 to 20 years of age and he would have reached majority sometimes in 1967, he did not take any steps to challenge the sale deed at Exh.79 till the 1/2 share covered by it was sold to defendant no.1 vide sale deed at Exh.81 dated 9/5/1983 and on this ground also the suit suffered from being beyond limitations. So far as the issue of legal necessity is concerned, it was pointed by the defendants that the plaintiff's father was alive till 18/11/1992 i.e. for about 27 years from the date of signing of sale deed at Exh.79 and 9 years from the date of signing of the sale deed at Exh.81 and at no point of time the plaintiff had taken any such plea and the issue of legal necessity could have been answered by the plaintiff's father alone.

5. The trial court on assessment of the evidence of both the parties, oral as well as documentary, held that both the sale deeds were null and void, the

plaintiff could not prove that he was in exclusive possession of the suit property and, therefore, he was not entitled for the relief of permanent injunction against the defendants as well as he was not entitled for relief of possession of the suit property as pleaded in the alternative. The suit was dismissed by the trial court holding that the suit was not within limitation, but the trial court allowed the counter claim of defendant no.1 as noted earlier.

6. Shri Deshmukh the learned counsel for the plaintiff submitted that once the trial court had come to the conclusion that the sale transactions were void as there was no evidence to hold that the plaintiff's father had sold the land for legal necessity of the family, it was incumbent upon the trial court to allow the suit and grant the decree. He further submitted that Article 109 of the Limitation Act was applicable on the issue of limitation as the suit property was never handed over by the plaintiff's father either to the defendant no.2 or defendant no.1 at any time.

6A. The trial court has examined the issue of

limitation and recorded a finding that on signing of the sale deed at Exh.79 the plaintiff's father Ganpat had put in possession of the late husband of defendant no.2 land admeasuring 2 H. 24.5 R. by signing the possession receipt at Exh.48 and late Tukaram in turn had handed over the possession of the 1/2 share on signing the sale deed at Exh.81 and, therefore, Article 109 was not applicable. The trial court held that the plaintiff was required to file the suit within a period of three years on attaining his majority and the plaintiff had admitted in his depositions that he attained majority in the year 1974 and consequently the suit ought to have been filed in the year 1977 i.e. much prior to the transaction of sale at Exh.81.

7. The Lower Appellate Court did not agree with the findings of the trial court on the issue of the sale deeds being void. It held that once the trial court came to the conclusion about the suit not being within limitations, it was not permissible for the trial court to examine the said issues and more so when on the own admissions of the plaintiff he had

attained majority in the year 1974 and the suit was filed almost 20 years later. It also noted that the plaintiff's father was alive till 18/11/1992 and no dispute was raised. The courts below also have recorded a finding that both the father and son were coparceners and in any case the father was entitled for 1/2 share leaving the remaining 1/2 share to the son i.e. the plaintiff. The father sold his 1/2 share way back in 1965 and there was no objection raised to the said sale transaction till he died in November, 1992.

8. Once it is held that the possession of 1/2 share sold was handed over on signing the sale deed at Exh.79 or in turn the sale deed at Exh.81, it would be clear that the plaintiff was required to approach the court for the relief of declaration and possession within three years. On this point it is necessary to note that on signing the sale deed at Exh.79 late Tukaram approached the Tahsildar for recording his name in the revenue records and on 16/1/67 the statement of Ganpat, the father of the plaintiff, came to be recorded by the Tahsildar as was evident from

Exh.48. Even the 7x12 extracts for the years 1993-94 (Exh.5), 1997-98 (Exh.44) clearly indicated that 1/2 share of the suit property was in possession of defendant no.1. Whereas the 7x12 extracts for the years 1867-68 (Exh.47) showed that late Tukaram was in possession of the 1/2 share of the suit property and some portion of the suit property was acquired under the Land Acquisition Act, 1894 and its compensation was paid to the respective owners (Exh.73) which indicated that 28 R land from the ownership of defendant o.1 was acquired and she received the compensation of the same. The plaintiff in turn had relied upon the revenue receipts at Exhs.61 to 63 and the trial court noted that these receipts did not stand in the name of the plaintiff alone and, therefore, they could not be relied upon when there was overwhelming evidence to show that late Tukaram was put in possession on signing Exh.79 and subsequently he handed over the 1/2 share to the husband of defendant no.1 on signing the sale deed at Exh.81. The plaintiff in his evidence had disclosed his date of birth as 20/12/1956 and even if that is accepted to be the correct statement the suit filed by

the plaintiff was beyond limitations having regards to the fact that on signing the sale deed at Exh.79 the possession of 1/2 share of the suit land covered by the same sale deed was handed over to late Tukaram by the plaintiff's father.

9. Both the courts below also noted that in the sale deeds at Exhs.79 and 81 the boundaries of the 1/2 share sold were not clearly set out and, therefore, once the ownership of defendant no.1 was established in respect of the same 1/2 share, it was necessary to partition the suit land in two equal shares and put the respective parties i.e. the plaintiff and defendant no.1 in possession of their respective share. It was under these circumstances, the counter claim made by defendant no.1 has been allowed.

10. The decree passed by the trial court and confirmed by the Lower Appellate Court, thus, does not involve any substantial question of law in this second appeal and, therefore, it must fail at the threshold. The same is hereby dismissed in limine.

(B.H. Marlapalle,J.)